

**One Stop Immigration and Education Center, Inc.
and International Union of Electronic, Electrical,
Salaried, Machine and Furniture Workers,
AFL-CIO, District 11 and Hector Alvarado.**
Cases 21-CA-32068 and 21-CA-32280

December 30, 1999

DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS LIEBMAN
AND BRAME

On February 16, 1999, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified below.²

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, One Stop Immigration and Education Center, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Within 14 days from the date of this Order, offer Hector Alvarado and Gumaro Oviedo-Flores full reinstatement to their former jobs or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed."

2. Substitute the attached notice for that of the administrative law judge.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

² We shall modify the recommended Order to provide the usual reinstatement remedy for employee Gumaro Oviedo-Flores. In compliance, the Respondent will have the opportunity to prove that Gumaro Oviedo-Flores is not entitled to reinstatement because of alleged misconduct occurring after his unlawful discharge. See *Marshall Durbin Poultry Co.*, 310 NLRB 68, 70 (1993), *enfd.* in pertinent part 39 F.3d 1312 (5th Cir. 1994). As stated by the judge, this issue was not fully litigated at the hearing.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate you about activities on behalf of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO, District 11, threaten you with unspecified reprisals unless you cease engaging in union activities, and offer to reinstate an employee if the employee stops engaging in union activities.

WE WILL NOT transfer or discharge you because you engage in union or protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of your rights pursuant to Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Hector Alvarado and Gumaro Oviedo-Flores full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Hector Alvarado and Gumaro Oviedo-Flores whole for any loss of earnings and other benefits suffered as a result of their discharges, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful transfer and discharge of Hector Alvarado and the unlawful discharge of Gumaro Oviedo-Flores, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the transfer and discharges will not be used against them in any way.

ONE STOP IMMIGRATION AND EDUCATION
CENTER, INC.

Eric M. Carr, Esq., for the General Counsel.
Alfred Klein, Esq. (Klein & Rosenbaum), of Glendale, California for the Respondent.
Jaime P. Martinez, Secretary-Treasurer, for the Union.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case was tried in Los Angeles, California, on July 21–24 and 28–30, 1998. The charge in Case 21–CA–32068 was filed by International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, District Eleven (the Union) on May 21, 1997.¹ The charge in Case 21–CA–32280 was filed by Hector Alvarado on September 18. The consolidated complaint was issued January 30, 1998. The complaint alleges the unlawful transfer and termination of Hector Alvarado, the unlawful termination of Gumaro Oviedo Flores, and several threats, an interrogation, and an unlawful offer of reinstatement conditioned on cessation of union activities.

All parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions. On the entire record, including my observation of the demeanor of the witnesses,² and after considering the briefs filed by counsel for the General Counsel and for Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent is a not for profit California corporation providing social services. It has facilities in the States of Washington, Oregon, and California. In the Los Angeles area, its main office is located at 3600 Whittier Boulevard. During the 12-month period ending December 31, 1997, a representative period, Respondent received gross revenues in excess of \$250,000 and purchased goods and services which originated outside the State of California but were purchased within the State from a vendor who received such goods or services directly from outside the State. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Facts

1. Background

Respondent provides immigration and naturalization services in the greater Los Angeles area where it maintains several facilities including Rancho Dominguez, Cesar Chavez, Long Beach, and Whittier Boulevard, the main facility. Juan Jose Gutierrez has been executive director for about 13 years. During the relevant time period Martha Sanchez was program man-

ager and functioned as controller and her husband, Jose Jacques (Pepe) Medina, was associate director.

In general, the board of directors and its executive director consider themselves pro-organized labor. Many of their activities are coordinated with labor organizations and some of the members of the board of directors are affiliated with labor organizations. In March 1997, the Union began an organizational campaign. Initially the Union was allowed to meet with employees at the main facility. In April, Office and Professional Workers International Union, Local 537, AFL–CIO began a campaign. A Stipulated Election Agreement was executed on April 29, 1997. Both Unions appeared on the ballots which were mailed on May 19. As a result of the election, the Union was certified to represent a wall to wall unit of Respondent's employees. Although negotiations were contentious at times, Respondent and the Union eventually executed a collective-bargaining agreement.

2. Gumaro Oviedo-Flores

In February 1990, Gumaro Oviedo-Flores began working for Respondent as a file clerk. He was discharged on April 28, 1997. His position at that time was program analyst which involved handling immigration cases and performing some computer and accounting functions. His immediate supervisor was Martha Sanchez. During the fall of 1996, Executive Director Gutierrez was in Washington, D.C. During his absence, Sanchez and Medina were in charge.

On September 21, 1996, Sanchez suspended Oviedo-Flores for 1 week and then transferred him to the Rancho Dominguez facility. This discipline was imposed for engaging in a fight with coworker, Eduardo Castro. The fight occurred at the Whittier facility, where both employees worked, on September 18, 1996. During the course of the fight, Oviedo-Flores bit Castro's thumb and butted Castro's nose with his head. Castro pulled Oviedo-Flores' hair. They exchanged punches.

Sanchez interviewed Oviedo-Flores before imposing the discipline. Oviedo-Flores and Castro testified substantially in agreement to the details of the fight. Castro added that his nose bled "a lot" and required three trips to the hospital. In any event, both Castro and Oviedo-Flores agreed that the fight was provoked by a remark Castro made about Oviedo-Flores' wife. Sanchez told Oviedo-Flores that the remark was insufficient reason to engage in a fight.³ In mid-January 1997, Oviedo-Flores was transferred back to the Whittier facility after conferring with Castro to ensure that he was comfortable in Oviedo-Flores' presence, providing an apology letter to his coworkers, and agreeing to a 4- to 5-month probation.⁴

³ The employee warning notice stated that the violation was severe. Even though there had been no prior discipline of Oviedo-Flores, this warning was given as a third warning. Should the incident occur again, Oviedo-Flores was warned that he would be discharged. However, the warning notice continues, because there were no known prior offenses, because Castro decided not to prosecute, and because Oviedo-Flores was a committed worker, he was not discharged immediately.

⁴ Castro disagreed with these facts. He stated that Oviedo-Flores was in Rancho Dominguez for only a few weeks and then began working at Whittier Boulevard again. He testified that he told Sanchez that this made him uncomfortable. I discredit Castro's testimony in this regard. Castro was not able to place dates very well and it was necessary for counsel to lead him in order to elicit testimony. Moreover, the memorandum of apology written by Oviedo-Flores on January 23, 1998, corroborates his testimony that he transferred back to Whittier around that date.

¹ All dates are in 1997 unless otherwise indicated.

² Credibility resolutions have been made based on a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

According to Gutierrez, he did not learn of the fight between Oviedo-Flores and Castro until early March when his brother Zeke called to complain about another matter involving Respondent and mentioned the fight. Zeke told Gutierrez to ask their cousin Emilia Arellano, who worked for Respondent, for the details. In mid-March, when Arellano came to his office to discuss a personal matter, Gutierrez questioned her about the fight. He explained that he did not speak with her sooner after learning of the fight in early March because he, "was involved doing any number of other things, including probably having to go to Sacramento on funding matters." Through Arellano, Gutierrez confirmed his brother's news about the fight and immediately contacted Mario Vasquez, president of the board, and related the events of the September 18, 1996 fight. Vasquez told Gutierrez that he thought this was a very serious problem due to potential liability. Gutierrez promised to keep Vasquez informed.

I do not credit Gutierrez, testimony regarding the timing of his knowledge of the fight. It is true that he was in Washington, D.C., when the fight occurred. However, he was in daily touch with his office during his absence. He most often spoke with Sanchez and Medina. Neither of these witnesses testified. However, three witnesses credibly testified that they discussed the fight with him prior to March. Maria Leticia Urias who functioned as receptionist during September and October 1996, spoke with Gutierrez who told her that he knew about the fight between Oviedo-Flores and Castro and everything had been taken care of. According to Urias, on Gutierrez' return in November 1996 he stated basically the same thing.⁵

Andres Gonzales, counselor in the Cesar Chavez office, had a conversation with Gutierrez in November. They initially spoke about the march in Washington, D.C. Then Gutierrez asked Gonzales what he knew about the fight between Oviedo-Flores and Castro. Gonzales responded that he knew as much as Gutierrez in that he was not present during the fight. Rather, he was at the Cesar Chavez facility when it happened.

According to Irma Torres, in 1996 or January 1997, Gutierrez came to her home to drop off a mutual friend, Francisco Barbla Alejandre. While Gutierrez was there, he told Torres that Oviedo-Flores had fought with Castro and, as a consequence, Oviedo-Flores had been transferred to Rancho Dominguez. Torres opined that this seemed more like a reward than a penalty because Rancho Dominguez was a very well run office.⁶

⁵ Urias resigned her employment with Respondent after being accused of stealing files. Urias believed that the accusation was unjust. She filed an unfair labor practice charge because she thought the accusation was due to her union activity. Urias stated that she was extremely upset about being terminated. Urias' daughter was also terminated by Respondent in April 1998. Urias was upset by this as well because she did not believe it was fair. After Urias was terminated, she began a business dealing with immigration and income tax. Her business is located in Downey, California. Urias impressed me as a truthful witness. She admitted she was upset when she was fired. However, I do not find that this biased her testimony.

⁶ Alejandre testified that he recalled being dropped off by Gutierrez but he disagreed that Torres and Gutierrez spoke about Oviedo-Flores. He testified that he was present during their entire conversation and at no time was Oviedo-Flores discussed. I credit Torres over Alejandre regarding this conversation. Torres impressed me as an especially credible witness who had no reason to embellish or manufacture testimony. Alejandre, on the other hand, currently is employed by Respondent and shares a home with its executive director. I also view with

On March 21, Oviedo-Flores and others recommended to the board of directors that Executive Director Gutierrez be discharged. The basis for this recommendation was, "his lack of respect to the charge that has been given [him], acting in an irresponsible manner and alienated in playing a consequent role with the movement and the fight for our community." The recommendation further noted repeated instances of abuse of employees.

At the next board meeting, on March 27, Gutierrez informed the entire Board of the Oviedo-Flores/Castro fight. He was instructed by the Board to make a thorough investigation and report back at the next board meeting.

On April 9, Oviedo-Flores signed a union authorization card. He was an open and active union advocate in that he distributed authorization cards to other employees, discussed the Union with other employees, wore union buttons, caps, and T-shirts, and had a bumper sticker on his car and office door. Many employees in addition to Oviedo-Flores had union bumper stickers on their cars and office doors. Six or seven other employees wore union insignia to work.

On April 22, Gutierrez sent a memorandum to Sanchez asking for a report about the fight. He explained that the delay between being directed on March 27 to investigate and April 22, when he began investigating, was "probably" because he had to deal with fiscal and grant matters and was in Sacramento a great deal of time. Gutierrez' calendar reflects that in March and April, he took four business trips. In addition, the board directed him on March 27 to find a forensic accountant to look into allegations of misappropriation of funds on the part of Sanchez and Medina. This also occupied his time.

On April 22, Oviedo-Flores received a letter from Executive Director Gutierrez stating that he had recently learned of an altercation between Oviedo-Flores and Castro. Gutierrez requested that Oviedo-Flores inform Gutierrez in writing regarding the details of the altercation no later than April 24, the date of the next board of directors meeting. Oviedo-Flores responded stating that he believed it was very suspicious that Gutierrez was only now investigating a well-known altercation. He suggested that it was because of union activities that Gutierrez was interested in the altercation and referred Gutierrez to his personnel file for further explanation. Gutierrez assisted Castro in writing the details of the fight in a memorandum dated April 24. Oviedo-Flores was discharged on April 28 for engaging in the altercation with Castro.

The board of directors was consulted throughout the process of investigating the fight in April. They fully supported Gutierrez' decision to discharge. At the time of the discharge, the board of directors was aware that Oviedo-Flores was involved in organizing the Union. One of the members of the board, Fabian Nunez, was aware of the fight because he had heard about it in talking with employees of Respondent. He could not remember when he learned of the fight. However, there is no dispute that board members were aware that the fight had not been a recent fight.

Irma Torres recalled a telephone conversation with Gutierrez in May⁷ in which Gutierrez asked Torres whether Oviedo-

skepticism his assertion that he heard every word spoken during the 15-minute conversation among four individuals.

⁷ Although Torres asserted that the conversation was in May, it was in connection with hiring a forensic accountant to look into matters of alleged financial wrongdoing by Sanchez and Medina. I note that the

Flores would be able to file an NLRB charge if Gutierrez discharged him. Torres asked what the reason for discharge would be. Gutierrez responded that the fight was the reason. Torres advised Gutierrez that she thought it would look very suspicious due to the union organizing campaign. Gutierrez responded that he would tell the NLRB that he had just learned of the fight. He further stated that he did not believe that Oviedo-Flores and Alvarado were loyal to him because they were supporting Martinez' union.

I do not credit Gutierrez' testimony that he learned of the fight from his brother in March. Although Gutierrez was an articulate, intelligent witness, it strains belief to find that after consulting the office daily during his absence in the fall of 1996, he was not informed of the fight at headquarters. Numerous witnesses testified credibly that Gutierrez was aware of the fight long before the spring of 1997. In addition, neither Gutierrez brother nor cousin was called to corroborate his testimony. Moreover, even were I to credit Gutierrez' version of the timing of his knowledge regarding the fight, his delay in acting on the information until after the advent of union activity at the facility suggests that the timing of his knowledge of the fight was inconsequential while the timing of learning of union activity directly correlates to the discharge of Oviedo-Flores.

3. Hector Alvarado

Hector Alvarado began working for Respondent in 1986 and was discharged on May 28, 1997. At the time of his discharge, he was site director at the Rancho Dominguez facility. According to Alvarado, his duties consisted of opening, closing, and cleaning the facility, assisting customers, answering the phone, attending citizenship fairs, and taking reports and revenue to the central office. Alvarado was considered by management to be somewhat obnoxious and confrontational throughout his employment. The president of the board of directors stated he, "had a history of basically ignoring the board and being totally insubordinate." Alvarado had never been disciplined for these actions.

In March, Alvarado distributed authorization cards and discussed unionization openly with other employees at the Rancho Dominguez facility and at the Whittier Boulevard office. Cesar Chavez, site director, Rudy Sanchez recalled that Alvarado came to his home several times to discuss the Union.⁸

board requested that Gutierrez find such an accountant at their meeting in March.

⁸ Important to Respondent's defense is the additional fact that Sanchez testified that Alvarado was accompanied by Associate Director Pepe Medina on these occasions. Sanchez testified that on an unspecified date, Alvarado and Medina came to his home to discuss the Union, "But I think that they had a—I felt that they had another ulterior movement, you know, motive that. . . . I guess they wanted me to go against the administration which I didn't think it was necessary." Later Sanchez said, "Well, it seemed to me that there was a power struggle, you know, that was being headed by Pepe at that time." Counsel for the General Counsel strenuously objected to this testimony as hearsay, because it lacked foundation, and because it constituted subjective opinion. The testimony was admitted to show it was said (to the extent actual conversation was part of the testimony) but not for the truth of the matters asserted therein. In later general testimony, Sanchez responded affirmatively to, "In your experience with [Alvarado and Oviedo-Flores] during this period and afterwards, did they continue to attack Juan Jose Gutierrez personally?" I do not give the totality of this testimony any weight due to the vague generalities and subjective conclusions elicited by leading questions.

a. *Alleged interrogation*

On April 21, Alvarado attended a meeting in the independence room at the Whittier Boulevard office. Gutierrez asserted to the approximately 20 assembled employees, according to Alvarado, that they were being deceived by the Union. Gutierrez told employees there was a better union. He also asked employees who was on the organizing committee for the Union. Alvarado responded that this was always the first question asked by management during a union campaign and the purpose was not to award prizes but to fire the members of the committee. Gutierrez responded that he had a right to know. Another employee, Rafael Barajas, asked Gutierrez if he was pronoun. Gutierrez responded that he was pronoun but when asked further whether he would sign a union contract, Gutierrez stated that he would not. Rafael Barajas and Andres Gonzales corroborated Alvarado's testimony regarding interrogation at this meeting.⁹ Gutierrez denied that he ever supported one union over the other. However, he did not deny requesting the names of the organizers.¹⁰

In mid-April, Alvarado requested vacation leave to begin on April 28 and conclude on June 6. During this time, Alvarado intended to work at the Whittier Boulevard office at the request of personnel there who needed his assistance for disabled citizenship applicants. His vacation request was approved by Medina. In about mid-May, Gutierrez asked Alvarado why he was working at the Whittier Boulevard facility. Alvarado explained that he was helping with disabled citizenship applications.

By memorandum of May 19, Alvarado and 22 other employees petitioned the board of directors for specific solutions to various work place problems. One of the solutions sought was a collective-bargaining agreement with the Union. Another was a full investigation of allegations of sexual harassment by Gutierrez. The board of directors responded, specifically addressing the response to Yolanda Santoyo and Hector Alvarado. The response indicated that it would be unlawful to bargain with the Union until it was certified. As to the remaining "grocery list," the board of directors declined to accommodate the request because their agenda was too lengthy already. The response also indicated that Alvarado's presence at the meeting was urgently required because he allegedly signed a lease for a new facility at Rancho Dominguez without board or executive director approval.

⁹ Barajas was discharged on December 19, 1997. He was angry about his discharge and believed that it was unfair. However, I do not find that this anger influenced his testimony regarding the April 21 meeting, or his later testimony about the May 27 meeting. Barajas appeared to be a straight forward, credible witness.

¹⁰ Respondent presented witnesses Rudy Sanchez, Juanita Quintaro, and Graciela Gonzales, all of whom recalled the same meeting in the independence room. Sanchez testified that Alvarado and others were disruptive during the meeting. They yelled requests that Gutierrez recognize the Union. According to Sanchez, Gutierrez responded that it was up to the workers to choose the Union. According to Sanchez, Quintaro, and Gonzales, Gutierrez did not express any preference for one union over the other during this meeting. However, none of them testified regarding whether the alleged interrogation occurred. Because there is no direct conflict in the testimony of the General Counsel's and Respondent's witnesses on the alleged interrogation, it is unnecessary to resolve the credibility conflict regarding preference of one union over another.

b. Alleged threat of unspecified reprisals

On May 22, Alvarado and Andres Gonzales, a fellow employee, spoke with Gutierrez by the water fountain at the Whittier Boulevard facility. According to Alvarado and Gonzales, Gutierrez stated that he was tired of the union campaign and if Alvarado did not halt the campaign, Gutierrez was going to “fuck”¹¹ him. Alvarado responded that Gutierrez was not supposed to intimidate employees. Gonzales joined Alvarado, telling Gutierrez that his comment was a violation. Gutierrez told Gonzales he was not speaking to him. Gonzales corroborated Alvarado’s testimony regarding this conversation. Gutierrez did not deny this conversation.

c. Alleged unlawful transfer

On Friday, May 23, Gutierrez told Alvarado that he was sending him to the Long Beach office. Alvarado protested that he was on vacation. Gutierrez reiterated that he was ordering Alvarado to report to the Long Beach office on Monday. Alvarado told Gutierrez he thought he was being sent to Long Beach because of the Union. Gutierrez did not respond.

At 9 a.m. on Memorial Day, Monday, May 26, Alvarado reported to the Long Beach facility. Long Beach is staffed by volunteers who are not Respondent’s personnel and the facility does not have uniform opening and closing times according to Alvarado. At 9 a.m., when Alvarado arrived, the facility was closed. He testified that he remained outside for 2 hours. When no one arrived, he left and returned the following day at 9 a.m. and again waited for 2 hours and no one arrived.

d. Alleged threat of unspecified reprisals

At this point, Alvarado went to the Whittier Boulevard facility and spoke with Gutierrez at about noon.¹² Gutierrez inquired why Alvarado was not at Long Beach. Alvarado retorted that Long Beach was not open. Gutierrez called the facility and then accused Alvarado of lying, stating that Alvarado had not been at Long Beach.¹³ Alvarado protested that he had reported to Long Beach. Gutierrez said that he was, “getting tired of all this. If you don’t behave about everything that is happening something can happen to you.” Alvarado asserted that Gutierrez was threatening him. Gutierrez responded that he had had enough and would take Alvarado to Long Beach himself. Alvarado declined the invitation stating that he did not want to ride with Gutierrez in light of the threat. Gutierrez told Alvarado to, “get out of here.”

Maria da la Luz Quezada testified that she was a volunteer at the Long Beach office. On May 27, Gutierrez told her that Alvarado would be reporting to that office to assist them. On

¹¹ This conversation was in Spanish. Alvarado testified that the particular epithet utilized, “is a dirty word like, something like fuck me but not quite.”

¹² Board Member John Fernandez testified that Alvarado and Felipe Aguirre came to his office on May 27. He thought they arrived sometime in the morning and stayed for about 15 minutes. The reason for their visit was to protest Gutierrez actions regarding the Union and to ask for his support. Fernandez’ testimony regarding their remarks was extremely vague and he did not recall the time of day of their visit with certainty. Nevertheless, Respondent claims, relying on this evidence, that Alvarado could not have reported to Long Beach and also been in Fernandez’ office. The evidence does not present as strong a case as Respondent claims. I cannot make such a conclusion when it appears to me that the two events are not mutually exclusive.

¹³ Gutierrez agreed that he had called the facility at 10:30 a.m. and no one answered.

May 28, Gutierrez called and asked if Alvarado had reported. Luz Quezada, who had gone to the bank for awhile that day, conferred with two other associates who were present while she was at the bank. She told Gutierrez that Alvarado had not reported. Interestingly, according to Luz Quezada, the hours at Long Beach are posted on the door. They are 11:30 a.m. to 7:30 p.m. However, there is no evidence that Alvarado saw this sign and there is no evidence that Alvarado was told that Long Beach differed from Whittier or Rancho Dominguez, both of which open at 9 a.m. Luz Quezada recalled that she reported to work on Monday, May 26, 1997 (Memorial Day) at 10 a.m. but did not open until 11:30 a.m.¹⁴

On the following day, May 28, Gutierrez discharged Alvarado for insubordination in failing to report to Long Beach¹⁵ and in his dealings with Gutierrez and the board of directors. The board of directors was aware of the decision to discharge Alvarado and was aware that Alvarado was a unionist. Alvarado had never been disciplined prior to this time.¹⁶ According to Gutierrez and board member, John Fernandez, who was present at the time when Alvarado received his discharge notice, Alvarado threw the discharge notice on Gutierrez’ desk and told Gutierrez that he was not God and could not decide whether to discharge Alvarado.

e. Alleged offer to reinstate if employee refrains from union activity

A meeting followed between Jaime Martinez, secretary-treasurer of the Union, Jose Jacques Medina, Andres Gonzales, Alvarado, and Gutierrez. Martinez asked the reason for Alvarado’s discharge. Gutierrez responded that Alvarado had failed to report to Long Beach. Martinez disagreed and told Gutierrez he needed to reinstate Alvarado. Gutierrez responded that he wanted to speak to Alvarado alone but since everyone was present, he would tell them what he wanted to do:

I want to make a deal with you. We are going to draw a document in which you will be resigning entirely but we are not going to date it. If you behave and don’t campaign any more I will put away that document and I will never take it out. But if you don’t change and continue with your Union campaign I will date it and make it effective.

Gutierrez asked Alvarado to think it over before responding. However, Alvarado said he might as well sign his life away. Alvarado, Martinez and Gonzales testified consistently regarding this meeting.¹⁷ Gutierrez denied that he attempted to make a

¹⁴ In a second report dated February 13, 1998, Luz Quezada added that Alvarado asked her to tell Gutierrez that he had reported to Long Beach but she refused to state this to Gutierrez. I do not credit this testimony or the testimony that the hours at Long Beach are posted and regular. In any event, it is clear that Alvarado was unaware of any such regular hours and it is also clear that Alvarado could easily have been in the parking lot and Luz Quezada could have been totally unaware of his presence if he did not repeatedly attempt to knock on the door.

¹⁵ Juanita Quintaro testified that she spoke to Alvarado after his discharge and Alvarado told her that the reason he was discharged was because he refused to apologize to Gutierrez. Alvarado asserted that Gutierrez was told that Alvarado had not reported to Long Beach. However, Alvarado told Quintaro that he did report to Long Beach.

¹⁶ Alvarado recalled that in 1990, a coworker reprimanded him for his activities while filing.

¹⁷ Juanita Quintaro testified that Alvarado told her he could get his job back if he apologized to Gutierrez for disrespecting him. According to Quintaro, Alvarado said he would not apologize.

deal. He recalled telling Alvarado that if the discharge being on his record was a problem, Gutierrez would be willing to allow Alvarado to resign. According to Gutierrez, Alvarado responded that he would not resign but he would be willing to sign a blank sheet of paper. Gutierrez testified that at no time did anyone raise the issue of Alvarado being on vacation. However, Gutierrez recalled another meeting at a later time when Martinez told him that Alvarado had been on vacation when he was discharged.¹⁸

At 6 p.m. on May 28, about 30 to 40 employees attended the board of directors meeting at the Whittier Boulevard facility. The employees were given a place on the agenda at 8 p.m. According to Alvarado, Barajas, and Gonzales, Yolanda Santoyo asked Mario Vasquez, the president of the board, why the board's response to the May 19 memorandum signed by 23 employees was addressed only to her and Alvarado. Vasquez responded that it was sent to them because they were the leaders of the union campaign. Discussion ensued about the election.¹⁹

B. Analysis

Before addressing the specific allegations involved herein, it is necessary to resolve two arguments advanced by Respondent.

1. Credibility

Numerous credibility resolutions have been noted throughout the recitation of facts. However, a few additional observations are warranted. Respondent introduced payroll records that indicated that Alvarado was not on vacation during the payroll periods ending April 25, May 9 and 23. None of these records indicated that Alvarado was paid vacation pay. The payroll records for the period ending June 6 indicate that Alvarado was paid vacation pay. Respondent argues, however, that Sanchez submitted this vacation request following Alvarado's discharge in order to discredit Gutierrez. Neither Sanchez nor Medina testified. I have only Respondent's counsel's assertion and his leading questions to witnesses to rely upon in finding that there was a scheme to get rid of Gutierrez and that Sanchez and Medina spear headed this scheme and enlisted Alvarado and Oviedo-Flores to that end. There is absolutely no evidence to indicate that Sanchez submitted a vacation request form after the fact in order to discredit Gutierrez. Respondent's argument is pure speculation. Accordingly, I find that Alvarado was on vacation at the time of his discharge.

In addition, the payroll records indicate that Martha Sanchez authorized a payment of accumulated sick leave to Alvarado in the amount of \$3480 on July 8. Similarly, payroll records indicate that Oviedo-Flores was paid a bonus of \$92, plus 96 hours of accumulated sick leave, 80 hours of regular time, and 20 days of vacation during payroll periods following his discharge. These payments were authorized by Sanchez. In all, the controller who replaced Sanchez, Mario Villa, found about 10 instances in which Sanchez had authorized payments of vacation or sick pay to Alvarado, Oviedo-Flores, and others which Villa believed were contrary to Respondent's policies. Respondent attacks the credibility of Oviedo-Flores, and Alvarado arguing

that these payments were contrary to the policies manual which specifically prohibits payment of accrued sick leave. Thus, Respondent argues the testimony of Oviedo-Flores and Alvarado has been purchased by Sanchez and her husband Medina in order to further their attempts to remove Gutierrez from his position as executive director. Neither Sanchez nor Medina testified. I refuse to speculate regarding the meaning of the payments of sick leave. I specifically find that Respondent has failed to prove any nexus between these payments and the testimony of Oviedo-Flores and Alvarado.

As to the alleged sexual harassment on the part of Gutierrez, Respondent introduced evidence that the employees who alleged such activity were very close friends of Sanchez. From this evidence, Respondent argues that Oviedo-Flores and Alvarado should be discredited. Once again, I am unwilling to make this leap of logic.

2. Alvarado's duties as site director

As site director²⁰ at Rancho Dominguez, Alvarado signed employee timesheets in the space allotted for supervisors. He permitted employees to leave work when personal emergencies arose. However, in order to schedule time off, employees had to contact the main office. Alvarado signed an employee change form in the "originator" box requesting that a part-time clerk become full time. Martha Sanchez signed in the box for "personnel." In June 1995, Alvarado recommended an employee for hire. The employee was hired. According to Alvarado, other employees also effectively recommended hiring. He recalled specifically that Felipe Aguirre recommended Alma Torres for hire and she was hired. Alvarado also originated a check requisition or pay advance request from Guadalupe Mora in March 1997. Alvarado's name appears as supervisor on this requisition. It was approved by Medina.

In March, Alvarado signed a 1-year lease as "lessee" for space to be occupied during that period by the Rancho Dominguez facility. He said that he and his coworkers knew that the building they were previously occupying was going to be sold. They found new space nearby but no one at the main office would sign the lease so Alvarado signed it. Alvarado thought that one of his coworkers negotiated the terms of the lease. Alvarado or one of his coworkers thereafter requested the rent money from the main office as it was due. These requests were subject to approval at the main office. Alvarado's presence was later requested at a board of directors meeting in order to explain his unauthorized signature on the lease.

Alvarado reported to Martha Sanchez and Jose Jacques Medina. He testified that he did not hire, fire, lay off, recall, discipline, reward, promote, transfer, or assign work to employees. He did not grant vacation requests or interview applicants.

Rudy Sanchez, another site director, testified that he also allowed employees to leave work when necessary. He recommended pay raises but there is no evidence whether the raises were granted. He did not approve vacation schedules. However, he did convey them to the main office.

Alvarado and all other site directors were included on the *Excelsior* list provided for purposes of the election. Alvarado's ballot was challenged by Gutierrez on the basis of his termination. Other employees on the *Excelsior* list, Julio Lopez, Pedro

¹⁸ Gutierrez denied that he said he would take Alvarado back if he would quit his union activities. I credit Alvarado, Martinez, and Gonzales regarding the meeting's events.

¹⁹ During the course of the discussion, all parties agree that the president of the board called Alvarado a "shit eater" on several occasions.

²⁰ Until March 1995, Alvarado was classified as legal counselor. In 1995, he was advanced to site director II with an increase from \$6.30 to \$9.50 per hour.

de La Cruz, and Rudy Sanchez, were also site directors. Their ballots were not challenged.

Gutierrez did not directly supervise the site directors until after Alvarado's discharge. He stated that their duties included collecting timecards, collecting funds and depositing the funds in the bank, collecting requisitions for vacation, requesting legal assistance, and taking materials back and forth to the main office. Gutierrez testified that when he took over supervision of site directors, that site directors could recommend specific individuals for employment or for termination, and supervise employees on a daily basis to make sure they reported to work, performed their work, and provided proper service. Prior to and since the time he took over site director supervision, Gutierrez believed that recommendations of the site directors with regard to discipline were usually followed.

Respondent argues from these facts that Alvarado was a supervisor based on his high rate of pay, the fact that he was in charge of a facility, he could grant time off and he could make effective recommendations as to employment status.²¹ Factually, these assertions are flawed. It is impossible to compare Alvarado's rate of pay with other employees because that evidence is not contained in the record. It does appear that Alvarado was the highest person in authority at the Rancho Dominguez site. However, without other indicia of supervisory authority, this factor alone cannot confer supervisory authority. Finally, as to Alvarado's ability to effectively recommend employee personnel actions, there is only one instance contained in the record. It is impossible to find supervisory authority based upon this one instance of effective recommendation. This is especially true in light of the un rebutted assertion that other employees made recommendations regarding hiring that were effectively followed. Respondent has failed to show by a preponderance of the credible evidence that Alvarado was a supervisor within the meaning of Section 2(11) of the Act.

3. Analytical Framework

In order to establish discriminatory motivation, the General Counsel bears the initial burden of persuasion to show that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. Traditionally, the elements utilized by the General Counsel in satisfying his burden of persuasion are union activity, employer knowledge of the activity, timing of the discipline or discharge in proximity to the activity, and employer animus. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action if the employee had not engaged in protected activity. If the employer produces such evidence, the General Counsel may rebut with evidence that the alleged discrimination would not have taken place in the absence of the protected activity.²²

4. Arguments

Counsel for the General Counsel asserts that he has shown direct knowledge of union and protected activity on the part of

Oviedo-Flores and Alvarado as well as animus towards that activity. Specifically, counsel notes that Gutierrez did not dispute that he told Torres that Oviedo-Flores and Alvarado were not loyal to him because they were supporting the Union. The timing of the investigation of Oviedo-Flores' 7-month old fight, 1 day after a meeting at which Gutierrez interrogated employees about the union organizing committee, is also suspicious according to counsel and he asserts that an inference is supported that union activity was actually the cause for the investigation. Finally, counsel notes that Respondent assisted employee Castro in reducing his version of the fight to written form but did not even look at Oviedo-Flores' personnel file, to which Oviedo-Flores referred the board for details of his suspension and transfer following the fight.

Counsel for the General Counsel also contends that Alvarado's transfer and discharge were unlawfully motivated. On May 22, Gutierrez told Alvarado that he was tired of his union activity. On May 23, he told Alvarado to report to the Long Beach facility. That facility is staffed solely by volunteers. This transfer removed Alvarado from Whittier Boulevard and Rancho Dominguez, where Alvarado had openly organized on behalf of the Union. Counsel relies upon the timing of the transfer, following closely on the heels of the threat regarding union activity, to support a nexus between the two events. Counsel also claims support from Alvarado's 12-year work record without incident of discipline and the failure of Respondent to conduct an investigation into the alleged failure to report to Long Beach.

Respondent characterizes this dispute as "wholly unrelated in any substantive manner to the issue of anti-union animus." Respondent asserts that the entire controversy is capable of explanation by looking beyond the framework of the Act to issues of personal bias. Respondent claims that Associate Director Medina and Sanchez, his wife, enlisted the Union in order to draw attention away from an investigation into their financial wrongdoing. Creating a "web of loyalty" around them, they caused the discriminatees herein to lie in order to harm Executive Director Gutierrez.

Respondent contends that there is absolutely no evidence of antiunion animus. Gutierrez allowed employees to campaign openly and to use Respondent's facilities for union activities. Moreover, Respondent voluntarily agreed to an election, recognized the winning Union, and successfully negotiated a contract. The board of directors unanimously voted that it had no objection to unionization of its employees. Prounion activists were allowed to address the board of directors even though they were not on the board's meeting agenda. Moreover, Gutierrez' business card notes that Respondent is a pro-organized labor, nonprofit community organization. Finally, Respondent points to the strong ties to organized labor among the members of its board of directors.

Furthermore, assuming a prima facie case has been made, Respondent argues that Alvarado would have been discharged in any event on the basis of insubordination and lying. Respondent relies specifically on Alvarado's mocking and sarcastic behavior, his failure to report to Long Beach, and its assertion that Alvarado was not on vacation at the time of his discharge.

²¹ Respondent also relies on the fact that Alvarado signed a lease on Respondent's behalf to support a finding of supervisory status. As to this factor, the record does not indicate that Alvarado possessed any such authority. Rather, the record indicates that Alvarado was called before the board of directors to explain his unauthorized action.

²² *Manno Electric*, 321 NLRB 278 (1996); *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

5. Analysis

I find that Gutierrez questioned employees about the identity of union organizers,²³ twice threatened Alvarado with unspecified reprisals in retaliation for his union activity, and agreed to reinstate Alvarado only if he eschewed union activity. These findings are based on the credibility resolutions set forth above.

In addition, I find that counsel for the General Counsel has adduced substantial credible evidence that the discharge of Oviedo-Flores and the transfer and discharge of Alvarado were motivated by union animus. I note specifically that Oviedo-Flores was discharged shortly after the advent of his open union activity for a fight which he engaged in 7 months prior to that time. Sanchez had already suspended and transferred Oviedo-Flores at the time of the incident. As to Alvarado, I rely specifically on the fact that he was an outspoken, insubordinate employee for 12 years and was not disciplined in any way for his behavior. With the advent of his union activity, he was transferred to a location away from other employees and then discharged without investigation.

I find that neither of these discharges would have occurred in the absence of the employees' union activity. If Respondent was seriously concerned about liability to its employees for Oviedo-Flores' fight, it would have consulted the personnel file in order to ascertain what was done at the time of the fight. If Respondent had really discharged Alvarado for failure to report, it would have presented other witnesses from the Long Beach facility to confirm the he was not present from 9 to 11 a.m. as he asserted. There is no evidence to indicate that Gutierrez even attempted to ascertain what time Alvarado reported to Long Beach and whether Luz Quezada looked outside in the parking lot at any time between 9 and 11 a.m. Accordingly, I find that Respondent has failed to show that either employee would have been discharged in any event.

CONCLUSIONS OF LAW

1. By interrogating employees about their union activities, threatening employees with unspecified reprisals unless they ceased engaging in union activities, and offering to reinstate an employee if the employee stopped engaging in union activities, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging Gumaro Oviedo-Flores and transferring and discharging Hector Alvarado, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and

²³ Interrogation is not, by itself, a per se violation of Sec. 8(a)(1). Interrogation is coercive if, under all the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Sec. 7 rights. *Emery Worldwide*, 309 NLRB 185, 187 (1993). Under this totality of circumstances approach, such factors as whether the interrogated employee is an open or active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation are examined. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). In this instance, the head of the organization demanded of all employees to know who the union leaders were. Under these circumstances, I find the interrogation coercive.

desist and to take certain affirmative action designed to effectuate the policies of the Act.

Respondent claims that Oviedo-Flores is not eligible for reinstatement due to two incidents which occurred after his discharge. I rejected evidence regarding these events but allowed Respondent to elicit the evidence in the form of question and answer offers of proof. The first incident was at the East Los Angeles College gubernatorial debates shortly before the primary elections. According to Respondent's witnesses, Oviedo-Flores grabbed Gutierrez by the tie, shook him and yelled at Gutierrez, calling him "puta," "cabron" and "maricon."²⁴ A security guard removed Oviedo-Flores.

The second incident occurred outside Respondent's main offices. Board Member Fabian Nunez was present for a press conference organized by Jaime Martinez during negotiations for a collective-bargaining agreement. Union picketers, including Oviedo-Flores, were present. Oviedo-Flores approached Nunez, raised his voice and challenged him to a fight by raising his fists close to Nunez' face and calling him a maricon and stating that Nunez was being manipulated.

Because I heard this evidence in question and answer offer of proof format and then rejected the offer of proof, counsel for the General Counsel did not attempt to rebut any of the evidence. Given Respondent's actions in suspending and transferring Oviedo-Flores for a fight with a coworker and Respondent's enduring the insubordination of Alvarado for the entire length of his employment, it is doubtful that Respondent will be able to prove that it would have discharged Oviedo-Flores for these incidents. Nevertheless, because the issue was not fully litigated, I leave to the compliance phase of this proceeding the issue of whether Oviedo-Flores should be reinstated. A provisional order of reinstatement will be recommended as to Oviedo-Flores.

Respondent, having discriminatorily discharged Gumaro Oviedo Flores must offer him reinstatement providing that a subsequent determination is made that he is entitled to reinstatement. Respondent, having discriminatorily transferred and discharged Hector Alvarado, it must offer him reinstatement. Further, both employees must be made whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁵

ORDER

The Respondent, One Stop Immigration and Education Center, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

²⁴ According to one of Respondent's witnesses, Rudy Sanchez, a "maricon" is a sissy or homosexual. According to Kevin de Leon, another of the witnesses, "maricon" means faggot or queer and is distinctly different than calling someone homosexual. In either event, both men testified that such language constituted fighting words.

²⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Interrogating employees about their union activities, threatening employees with unspecified reprisals unless they ceased engaging in union activities, and offering to reinstate an employee if the employee stopped engaging in union activities.

(b) Discharging or otherwise discriminating against any employee for supporting International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL–CIO, District 11, or any other union.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Hector Alvarado full reinstatement and offer Gumaro Oviedo-Flores provisional reinstatement subject to a supplement proceeding to their former positions of employment or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Gumaro Oviedo-Flores and Hector Alvarado whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful transfer and discharges, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities in the greater Los Angeles area copies of the attached notice (in both English and Spanish) marked “Appendix.”²⁶ Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 21, 1997.

²⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”